APR-26-2002 14:14 LN P.02

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IN THE
SUPREME COURT OF THE UNITED STATES

SUSAN TAVE ZELMAN, *Petitioner*,
v.
DORIS SIMMONS-HARRIS ET AL., *Respondents*.

On Petition For A Writ of Certiorari
to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN CENTER FOR LAW AND JUSTICE, AND FOCUS ON THE FAMILY IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 3

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT 3

II. THE PETITION SHOULD BE GRANTED BECAUSE STATE AND FEDERAL APPELLATE COURTS ARE SPLIT ON THE CONSTITUTIONALITY OF SCHOOL VOUCHER PROGRAMS UNDER THE ESTABLISHMENT CLAUSE 9

CONCLUSION 13

APR-26-2002 14:14 LN

TABLE OF AUTHORITIES

CASES: Page(s)

Agostini v. Felton, 521 U.S. 203 (1997) 5, 9

Campbell v. Manchester Board of School Directors, 641 A.2d 352 (Vt. 1994) 12

Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 3, 10, 12

Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998) 11

Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999) 12

Lamb's Chapel v. Center Moriches Union Free School Board, 508 U.S. 384 (1993) 1

Matthew J. v. Massachusetts Dep't of Educ., 989 F. Supp. 380 (D. Mass. 1998) 13

Mitchell v. Helms, 120 S. Ct. 2530 (2000) ..... passim

Mueller v. Allen, 463 U.S. 388 (1983) 3, 8

Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) 11

Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000) ..... passim

Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999) 11

Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999) 11

Westside Community Schools v. Mergens, 496 U.S. 226 (1990) 1

Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) 4, 8

Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) 4

P.04
APR-26-2002 14:15

APR-26-2002 14:15 LN P.05

INTEREST OF AMICI CURIAE[1]

Focus on the Family is a California nonprofit religious corporation committed to strengthening the family in the United States and abroad. The president of Focus on the Family, James C. Dobson, Ph.D., is a child psychologist who has written extensively on child rearing and family relations. Dr. Dobson hosts and Focus on the Family distributes a daily radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada, and around the world. Focus on the Family publishes and distributes *Focus on the Family* magazine and other literature that is received by more than 2 million households each month.

Representing Focus on the Family, and appearing on its own behalf as well, is the American Center for Law and Justice (ACLJ). The ACLJ is a nonprofit public interest law firm and educational organization dedicated to protecting First Amendment freedoms, human life, and the family. ACLJ attorneys have argued or participated as amicus curiae before this Court in numerous cases presenting Establishment Clause issues. *See, e.g., Mitchell v. Helms*, 120 S. Ct. 2530 (2000); *Lamb's Chapel v. Center Moriches Union Free School Board*, 508 U.S. 384 (1993); *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

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[1] Counsel of record for the parties in this case have consented to the filing of this brief. Pursuant to Rule 37.6, amici disclose that no counsel for any party in this case authored in whole or part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than amici curiae.

P.06/12

Amici are committed to the principle that parents are responsible for the education of their children and that parents have the right to choose schools that best serve their children's educational needs. Maximizing educational choices for parents is therefore essential, especially for those families who are otherwise unable to afford private school tuition. School vouchers represent a permissible way of leveling the playing field so that all parents can choose the education that suits their values and their children's needs. A state's effort to provide funds to parents so that parents can more effectively choose the education they think best suits their children's needs is not an establishment of religion. Amici are concerned that the federal courts of appeals, including the courts below in this case, are misinterpreting this Court's Establishment Clause jurisprudence to endorse blatant discrimination against religious schools in cases involving generally available educational assistance. School voucher programs that accord the same treatment to religious schools and to secular private schools alike are consistent with this Court's interpretation of the Establishment Clause.

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APR-26-2002 14:23

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in Petitioners' Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

Over the course of the last two decades, this Court has considered a number of times the permissible extent of aid to private schools or aid to parents and students to be used to enable a student to attend a private school when a portion of that aid goes to religious schools. Generally speaking, the Court has upheld programs that do not differentiate for eligibility for aid between religious and non-religious schools. For example, in *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld a Minnesota statute authorizing a tax deduction for educational expenses of students attending either public or private schools. The Court distinguished its decision in *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) on the grounds that, unlike the New York statute in *Nyquist*, the Minnesota law permitted all parents, whether their children attended public or private schools, to deduct their children's educational expenses. 463 U.S. at 401-02. This Court also emphasized that under Minnesota's scheme, public funds flow to "sectarian schools only as a result of numerous private choices of individual parents of school-age children." *Id.* at 399. This Court dismissed as insignificant the fact that 96% of the schools involved

P.07/12

were religious in nature. "We would be loath to a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Id.* at 401.

In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), this Court again stressed the importance of the fact that government funds reached religious school coffers only as a result of independent private choices. The Court held that Washington did not violate the Establishment Clause by providing funding to a blind student who used the funds to attend a Christian college to become a pastor. And, in *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993), the Court held that a school district could provide a sign language interpreter (at government expense) to a student in a Catholic high school. The program was available for both public and private schools, and was implemented in the sectarian school entirely upon the choice of the student and his parents. 509 U.S. at 3.

In all three of these cases, the programs at issue were neutral with regard to religion. In *Mueller*, tax credits were available for educational expenses incurred at public or religious or non-religious private schools. Likewise, in *Witters* and *Zobrest*, the programs at issue allowed students to use the aid they received at the school of their choice, whether public or private, religious or non-religious.

In 1997, this Court relied in large part on *Mueller*, *Witters*, and *Zobrest* to uphold a federal program that provided public employees to teach remedial classes at

private schools, including religious schools. *Agostini v. Felton*, 521 U.S. 203 (1997). In *Agostini*, the Court set forth the test for determining the constitutionality of aid to private religious schools. Such aid does not violate the Establishment Clause if the aid has a secular purpose and does not have the primary effect of advancing religion. Aid does not have the primary effect of advancing religion if it 1) does not result in governmental indoctrination of religion; 2) does not define its recipients by reference to religion; and 3) does not create an excessive entanglement between government and religion. *See Id.* at 232-34. The Court held that the aid in *Agostini* passed this test because it provided supplemental remedial instruction on a neutral basis to disadvantaged children who attended both public and private schools. *Id.* at 232.

If there was any doubt remaining about the analytical framework to be used in evaluating the constitutionality of government educational assistance programs, it was dispelled last term in *Mitchell v. Helms*, 120 S. Ct. 2530 (2000). In that case, six Members of this Court agreed that the *Agostini* test controlled its Establishment Clause analysis of school aid programs. *See* 120 S. Ct. at 2540 (plurality); *id.* at 2556 (O'Connor, J., Breyer, J., concurring).

Applying this test to Cleveland's school voucher program demonstrates that the program is constitutional under *Mueller*, *Witters*, *Zobrest*, *Agostini* and *Mitchell*. First, the voucher program has a secular purpose — "to save Cleveland's mostly poor, mostly minority, public school children from the devastating consequences of requiring them to remain in the failed Cleveland schools."

APR-26-2002 14:23 LN

P.08/12

Simmons-Harris v. Zelman, 234 F.3d 945, 967 (6th Cir. 2000) (Ryan, J., dissenting).[2]

Cleveland's school voucher system also does not impermissibly advance religion. It is clear on its face that Cleveland's voucher program — one that allows parents to use vouchers at religious or non-religious schools — does not define its recipients by reference to religion. Cleveland's voucher program does not result in governmental "indoctrination" of religion because any indoctrination that occurs is not fairly attributable to governmental action. As Justice O'Connor said, "when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, ' no reasonable observer is likely to draw from the facts... an inference that the state itself is endorsing a religious practice or belief.'" *Mitchell*, 120 S. Ct. at 2559 (O'Connor, J. concurring.) "If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination." *Id.* at 2541 (plurality).

The majority opinion below discredited the array of choices offered under the Cleveland school voucher program because no eligible suburban public schools chose to participate in the program. *See* 234 F.3d at 960. The court also faulted Cleveland's program because 82% of the participating schools are church-affiliated. The court attributed this percentage of religious schools to the

[2] Plaintiffs in this suit did not contest the school voucher program's secular purpose. *See Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 844 n.6 (N. D. Ohio 1999).

program's tuition cap which limited the tuition that schools could charge to participating students.[3] The court speculated that only religious schools could afford to comply with the program's tuition restrictions. 234 F.3d at 959.

First, the court's speculation is unfounded because ten secular private schools participated in the Cleveland voucher program. Even if there were evidence to support this speculation, it has no bearing on the question whether government indoctrination occurs. The focus of the "government indoctrination" inquiry is on the government's actions, not on other private or municipal entities' response to the program. To condition a voucher program's validity under the Establishment Clause on how successfully the program recruits suburban public school participation would be to hinge constitutional analysis on something akin to a heckler's veto. Given the public educational establishment's rabid opposition to the entire concept of school vouchers, it is not surprising that no suburban public schools participate in Cleveland's school voucher program. This Court has refused to countenance the notion that a neutral school aid program's

[3] The court's characterization of this statutory provision implied that participating schools must cap tuition for all students, not just those participating in the voucher program. "The program requires participating schools to cap tuition at $2500 *per student* per year." 234 F.3d at 948 (emphasis added). That sleight of hand buttressed the court's point that secular private schools could not afford to participate in the voucher program. The statute states, however, that the tuition cap applies only "to low-income families participating in the scholarship [voucher] program...." Nothing in the statute prevents a school from charging other students whatever tuition the school desires and the market will bear. *See* Ohio Rev. Code § 3313.976 (A)(8).

APR-26-2002 14:24 LN

constitutionality depends on a statistical composite showing that the "right" kinds of beneficiaries participate in the program. *See Mueller*, 463 U.S. at 401; *Witters*, 474 U.S. at 486-88.

Cleveland's program offers a wide array of choices: Cleveland parents can send their children tuition-free to public schools. They can also send their children to ten secular private schools that participate in the program. They can send their children to a variety of sectarian schools that participate in the program. 234 F.3d at 960. And, they can accept a voucher for their children to obtain special tutorial assistance in the Cleveland schools. *Id.* at 968 (Ryan, J., dissenting). Any support of religious schools is the result of individual choices. Thus, under this Court's decisions in *Mitchell* and *Agostini*, no governmental indoctrination has occurred.

Similarly, the lower court's holding that the Cleveland voucher program creates a financial incentive for parents to send their children to sectarian schools, *see* 234 F.3d at 959-960, cannot be squared with this Court's holding in *Mitchell v. Helms*. The plurality opinion stated that "simply because an aid program offers private schools, and thus religious schools, a benefit they did not previously receive does not mean that the program, by reducing the cost of a religious education, creates, under *Agostini's* second criterion, an 'incentive' for parents to choose such an education for their children." Justices O'Connor and Breyer agreed with the plurality that no financial incentive is present "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."

Id. at 2561 (O'Connor, J., concurring) (quoting *Agostin* 521 U.S. at 231). Moreover, as the *Mitchell* pluralit noted, holding that aid automatically creates the forbidde incentive would invalidate all such aid because "any ai will have some such effect." *See id.* at 2544.

By providing vouchers to parents, the governmer does not really create any financial incentive to choos private (including religious) schools over public schools In the absence of a voucher or some other progran defraying the costs of educational expenses, a parent ca choose to send his children tuition-free to a public schoo or to pay tuition at a private school. Thus, withou vouchers, the only financial incentive the governmen creates is the incentive to send children to public schools Vouchers merely remove (or in most cases, reduce) thi incentive by providing the wherewithal to pay all or par of private school tuition. Any incentive to take advantage of the voucher to send a child to private school is not financial (e.g., the desire to send a child to a private school because the school offers a better academic program or a program more suited to the child's needs) and is not created by the state (except, perhaps, where government's inept operation of public schools makes private schools a more attractive option, which obviously ought not be the kind of government action that invalidates vouchers).

The conclusion that merely providing vouchers does not create the forbidden financial incentive discussed in *Agostini* does not change even if the only schools available to parents are religious. A lack of non-religious private schools should not matter because a non-religious alternative still exists — the public school. In any event, there are several secular private schools available to

P.09/12
LN
APR-26-2002 14:25

P.10/12

Cleveland parents under the Cleveland school voucher program. Moreover, as noted above, a voucher does not favor religious schools by creating a financial incentive to send children to public schools. Finally, there is no discrimination against private non-religious schools. So long as the voucher program does not create artificial barriers to entry to the education market, the program does nothing to prevent anybody (whether religiously motivated or not) from opening a private school and taking advantage of the vouchers. In fact, by making private schooling more affordable and therefore more attractive to parents, vouchers may well encourage the establishment of new non-religious private schools.

II. THE PETITION SHOULD BE GRANTED BECAUSE STATE AND FEDERAL APPELLATE COURTS ARE SPLIT ON THE CONSTITUTIONALITY OF SCHOOL VOUCHER PROGRAMS UNDER THE ESTABLISHMENT CLAUSE

The question presented in this case is the subject of diametrically opposed decisions among state and federal appellate courts. The split among the federal and state judiciary on whether school voucher programs violate the Establishment Clause is due to confusion over whether this Court's recent school aid cases, including *Agostini v. Felton*, 521 U.S. 203 (1997) and *Mitchell v. Helms*, 120 S. Ct. 2530 (2000) provide the appropriate analytical framework, or whether the Court's opinion in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) dictates that school voucher programs that include religious schools be struck down. Both the First

and Sixth Circuits have held that *Nyquist* controls the constitutionality of school voucher programs.

In *Strout v. Albanese*, 178 F.3d 57, 62 (1st Cir. 1999), the court held that *Nyquist* required Maine's tuition reimbursement program to exclude sectarian schools from participation. In this case, the Sixth Circuit held that *Nyquist* compelled its conclusion that Ohio's school voucher program was unconstitutional. *See Simmons-Harris v. Zelman*, 234 F.3d at 953; *see also* 72 F. Supp. 2d 834, 848 (district court opinion).

In contrast, three state supreme court decisions have explicitly rejected the analysis adopted by the two lower federal courts in this case, and by the First Circuit. In *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), the court upheld against an Establishment Clause challenge the same voucher program that the Sixth Circuit struck down in this case. Rejecting plaintiffs' argument that *Nyquist* controlled, the Ohio Supreme Court observed: "The *Nyquist* holding has been undermined by subsequent case law that culminated in the court stating, 'we have departed from the rule ... that all government aid that directly aids the educational function of religious schools is invalid.'" 711 N.E.2d at 208 (quoting *Agostini*, 521 U.S. at 225).

In *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), the Wisconsin Supreme Court upheld a school voucher program very similar to Ohio's. The program provided qualifying Milwaukee parents a choice of sending their children to public or private schools, including sectarian institutions. For each student attending a private school under the program, the state paid

approximately $2,500 per student to the student's parents. The check was mailed to the private school where the student was enrolled, and the parent then restrictively endorsed the check over to the school. 578 N.W.2d at 608-09. As in this case, a large majority of participating schools were sectarian: of 122 qualifying private institutions, 89 were religious schools. The court nevertheless held that the program did not violate the Establishment Clause. "We reject Respondents' argument that this case is controlled by *Committee for Pub. Educ. and Religious Liberty v. Nyquist*." *Id.* at 614 n.9. Analyzing this Court's recent decisions in *Agostini*, *Mueller*, *Zobrest*, and *Witter*, the court concluded that the Milwaukee Parental Choice Program, "which provides a neutral benefit directly to children of economically disadvantaged families on a religion neutral basis, does not run afoul of any of the three primary criteria the Court has traditionally used to evaluate whether a state educational assistance program has the purpose or effect of advancing religion." *Id.* at 620.

Similarly, in *Campbell v. Manchester Board of School Directors*, 641 A.2d 352 (Vt. 1994), the Vermont Supreme Court held that a state tuition reimbursement scheme did not violate the Establishment Clause, finding the "case to be governed by *Mueller* and *Witters* and not by *Nyquist*." 641 A.2d at 360. The court reasoned that because the program covers all students whether they attend a public or private school, it "'neutrally provides state assistance to a broad spectrum of citizens [and] is not readily subject to challenge under the Establishment Clause.'" *Id.* (quoting *Mueller*, 463 U.S. at 398-99). *Cf. Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (upholding state tax credit for contributions to scholarship

fund for private schools, even though significant percentage of Arizona private schools were religious); *Matthew J. v. Massachusetts Dep't of Educ.*, 989 F. Supp. 380, 391-92 (D. Mass.1998) (upholding special education assistance for student attending Christian school).

In short, the First and Sixth Circuits' decisions are irreconcilable with the decisions of the Ohio, Wisconsin, and Vermont Supreme Courts. The key to each court's decision was its understanding of *Nyquist*. Interpreting *Nyquist* in a vacuum produced the result that the school voucher program was unconstitutional. Interpreting *Nyquist* in the light of *Mueller*, *Witters*, *Zobrest*, *Agostini*, and *Mitchell* produces the opposite result. As the dissent stated below, even if *Nyquist* retains some vitality after *Mueller* and its progeny, it is clearly distinguishable from school voucher programs such as those in effect in Ohio and Wisconsin. *See* 234 F.3d at 964 (Ryan, J., dissenting). To the extent that *Nyquist* can be understood to cast doubt on the constitutionality of school voucher programs, however, the Court's decisions in *Mitchell*, *Agostini*, *Mueller*, and *Witters* contradict such an interpretation. As it did last term when it granted certiorari in *Mitchell v. Helms* to resolve the inconsistency between *Agostini* and *Meek v. Pittenger* and *Wolman v. Walter*, this Court should grant certiorari in this case to resolve any inconsistency between *Agostini* and *Mitchell*, and *Nyquist*.

P.11/12
LN
APR-26-2002 14:26

CONCLUSION

The decision below directly conflicts with decisions of state appellate courts of last resort, as well as this Court's jurisprudence governing the constitutionality of government educational assistance programs under the Establishment Clause. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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P.12/12
TOTAL P.12
LN
APR-26-2002 14:27